Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Revision of the Commission's Program Carriage Rules	)	MB Docket No. 11-131
Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage	)	MB Docket No. 07-42

COMMENTS OF
HDNET ENTERTAINMENT LLC

David S. Turetsky
J. Porter Wiseman
Dewey & LeBoeuf LLP
1101 New York Avenue NW,
Suite 1100
Washington, DC 20005-4213

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HDNet Entertainment LLC, a Delaware limited liability company, and HDNet Movies LLC, a Delaware limited liability company, (together, "HDNet") provide these Comments in response to the Federal Communications Commission's (the "Commission" or the "FCC") Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131 ("NPRM"), adopted on July 29, 2011.[1] HDNet is an independent programming company delivering two 1080i high definition ("HD") channels known as "HDNet" and "HDNet Movies." HDNet is the high definition home for popular and original programming, such as comedy, drama, sports, and music. HDNet also features television's only

[1] HDNet incorporates into these comments by reference all of its prior submittals in MB Docket No. 07-42.

HD news feature programs: *HDNet World Report* and the Emmy Award-winning[2] *Dan Rather Reports*, featuring legendary journalist Dan Rather. HDNet Movies offers viewers a premium high-definition movie experience featuring first-rate films, and is the only network to defy Hollywood convention by regularly offering its viewers the ability to enjoy full-length feature films in the comfort of their own home *before* the films premiere in theaters. HDNet is not affiliated with any multichannel video programming distributor ("MVPD") or with any of the major content companies that provide many channels to MVPDs and operate in a corporate environment. Mark Cuban, the Chairman, Chief Executive Officer, and President of HDNet, personally makes the programming decisions for the HDNet channels.

Introduction and Summary

HDNet commends the Commission's decision to revise its program carriage rules to conform to Congress' mandate in the Cable Television Consumer Protection and Competition Act of 1992.[1] In Section 616 of the Cable Act of 1992 ("Section 616"), Congress recognized the vulnerability of independent programmers to discrimination, and directed the FCC to conduct an "expedited review" of complaints submitted by independent programmers which allege that an MVPD has committed a violation, such as by requiring a financial interest in a programmer as a condition of carriage, or unreasonably restraining the ability of an independent programmer to compete fairly by discriminating on the basis of affiliation or non-affiliation.

It is crucial that in addressing the current NPRM the Commission fully appreciate and take into account the vastly disparate access that MVPDs and most independent programmers

[2] *Dan Rather Reports* has won multiple Emmy Awards on HDNet, most recently in 2011.

have to crucial information, the major difference in leverage this provides to MVPDs, and understand that this is no accident, but is reinforced through nondisclosure and other contract terms required by most MVPDs.

HDNet's comments focus primarily on six issues raised by the Commission in the NPRM. First, the Commission should adopt the "program access" burden of proof framework, which shifts both the burden of persuasion and the burden of production to the defendant once the complainant has established a prima facie case of discrimination, regardless of whether the complainant has made their case using direct or circumstantial evidence. The informational disadvantages of independent programmers in comparison to MVPDs make this appropriate.

Second, the Commission should establish a rule requiring that certain types of documents be produced automatically upon the finding of a prima facie case of discrimination and a decision by the Media Bureau that it will rule on the merits after discovery. This would make the discovery process more efficient and allow the parties to begin gathering documents as soon as a complaint is filed. The FCC's proposal should be expanded to include certain additional documents relating to an MVPD's direct or indirect ownership interests or control, including past interests, and present and future contingent interests (such as grants, warrants, or options to purchase) in a network.

Third, the Commission should expand its program carriage rules to prohibit all forms of retaliation. The Commission should adopt a rule prohibiting an MVPD from taking an adverse carriage action against a programmer because that programmer has taken advantage of the carriage complaint rules or stated an intent to do so. In certain circumstances, an adverse

carriage action against a programmer, other than the action at issue in the initial or threatened program carriage complaint, should be considered a prima facie case of retaliation.

Fourth, the Commission's program carriage rules should prohibit all forms of discrimination on the basis of affiliation that would otherwise satisfy the statute. Even MVPDs that own no programming interests can discriminate in favor of programming on behalf of a third party. The common practice of wholesale tying or bundling, and agreement by MVPDs to accept it, is a form of discrimination on the basis of affiliation of programming networks. Discrimination by an MVPD based on affiliation that injures an independent programmer in order to accommodate carriage of multiple bundled networks, some undesirable, under common ownership or control of a major content provider, should be prohibited under the statutory language.

Fifth, MVPDs should be required to negotiate in good faith. Bad faith negotiations are often a backdoor to discrimination, and sometimes may be a device to avoid an outright refusal of carriage that might trigger a complaint.

Sixth, the Commission should adopt rules allowing for the award of damages, including punitive damages, for violations of the carriage rules. Damages would not only help to make programmers that have been wrongfully denied carriage whole, but they would also serve to encourage settlement and deter discriminatory conduct by MVPDs. On a similar note, however, the Commission should reject a "true-up" after a standstill. A true-up would be far more burdensome to programmers than MVPDs for several reasons and would deter the use of the complaint process.

I. Independent Programmers Are at an Informational Disadvantage When Exercising Their Rights Against MVPDs

Independent programmers suffer from a severe informational disadvantage both in negotiating with MVPDs and in attempting to exercise their rights under Section 616. The MVPD often holds all of the "cards" when it comes to information, and actively maneuvers to keep this advantage. For example, MVPDs typically require non-disclosure clauses in connection with their carriage negotiations and in their carriage agreements, which make it hard for independent programmers to learn and compare what terms and conditions are available in the current universe of carriage contracts. The MVPD, by contrast, is intimately familiar with that universe. Not only does it know the terms of its deals with every network it carries and of its offers or negotiations with even more networks, but it may also get information about the deals that programmers have with *other* MVPDs through "most-favored nations" clauses, which MVPDs often insist upon including in their contracts. Furthermore, an MVPD knows its own circumstances and negotiating latitude: budget for programming, channel capacity, schedule of availability, the audience on their systems for the networks that it carries, including, potentially, of the independent network with whom it is negotiating. An MVPD also does not necessarily have to disclose its financial interests or ownership, direct or indirect, in another competing programmer, or any contractual agreements it might have with such a programmer. It also need not disclose its reasons or tell an independent programmer the truth about why it will not provide carriage on particular terms or at all. [3] This informational disparity advantages MVPDs, not only

[3] For example, review of the direct testimony and cross-examination of Robert Wilson of Cox Communications in the hearing on WealthTV's discrimination complaint before an Administrative Law Judge in

in legitimate negotiations, but also in concealing discrimination from independent programmers. This makes it difficult for an independent programmer to know, in a timely fashion, if at all, whether it has a timely and meritorious carriage claim worth the potential seven-figure cost of, and the risk of retaliation for, asserting that claim.

Not only do independent networks suffer from an informational disadvantage, but until now, weak carriage complaint rules have stripped them of almost all leverage that they might use to enforce their rights during negotiations. The filing of a carriage complaint is expensive, and

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Docket No. 08-214, indicated that Cox's favorable handling of two networks that were affiliated with Cox -- namely iNHD1 and iNHD2 -- was in significant part motivated by carriage of HDNet and HDNet Movies by a Cox competitor. Mr. Wilson's testimony about why Cox did not simply carry HDNet and HDNet Movies, rather than launch and favor two affiliated networks modeled after HDNet and HDNet Movies, demonstrates that: (i) a programmer may not find out until years later, if ever, what rationale an MVPD had for denying carriage of its network; and, (ii) if HDNet had known Cox's purported reasoning at the time it was denied carriage, HDNet would have been willing and able to satisfy Cox's concerns. HDNet could also have demonstrated that other issues that Cox claimed to have been of concern at that time were utterly specious, removing Cox's fig leaf for favoring its own affiliated networks and refusing carriage of HDNet and HDNet Movies.

Wilson explained the background for launching and favoring the two affiliated networks, testifying that Cox's competition had been faster to launch HD channels, including carriage of "an independent service called HDNet" with "two feeds." P. 4871. He said the Cox affiliate, iNDemand, proposed "two channels very similar to what HDNet had at the time…." p. 4878. Like HDNet, iNHD1 and iNHD2 would go after "early adopters" and the same demographic, "primarily young males." See p. 4883. Wilson testified that "what we were really needing at that point in time was content that would be relatively comparable to what HDNet was doing…." p. 4882.

However, at the time Cox and HDNet were in discussions, Wilson didn't actually share with HDNet the reasons that he mentioned years later in his testimony for not simply carrying HDNet. For example, he testified that for various reasons Cox wanted an agreement with a shorter duration than HDNet requested, p. 4926, but HDNet would have been willing to shorten the proposed agreement if asked. He testified that Cox needed to be able to preempt the HD networks it carried and could do so with iNHD1, but Cox did not tell HDNet that it wanted those rights. HDNet had previously agreed to preemption clauses with other MVPDs and would have been willing to do so at that time if Cox had asked. Finally, Wilson's argument that HDNet was expensive left out important information that would have put that contention in a much different light. *See* p. 4871. He failed to explain to the ALJ that HDNet used a different unit for its pricing than that used by iNHD 1 and iNHD2 even though all of these channels were viewable only by HD subscribers (i.e., high definition subscribers for HDNet and HDNet Movies vs. digital subscribers for iNHD1 and iNHD2). The number of digital subscribers, most of whom were not also HD subscribers at the time and some of whom did not even have access to an HD service, was much larger than the number of HD subscribers. Thus, HDNet's higher rate per HD subscriber would not necessarily be more costly to an MVPD than a much lower rate by the affiliated networks based on the much larger number of the MVPD's subscribers with digital service. Moreover, HDNet certainly could have conformed its license fees to the per-digital structure if Cox had proposed it.

risky, because of the real possibility of retaliation by an MVPD. Independent programmers are dependent on distribution for their survival; ironically, an independent network's filing of a complaint challenging illegal constraints on its distribution may not only increase its costs and create uncertainty, but also spur retaliation, which collectively, or individually, could be fatal to a programmer with limited resources, especially if a large MVPD is involved. Although the Commission's adoption of a "shot clock,"[4] a "standstill"[5] and other reforms is an important first step, the FCC must go further to enact a regulatory scheme protecting diversity and competition as Congress intended when it passed Section 616.[6]

II. The Commission Should Adopt the "Program Access" Burden of Proof Framework

Disparity in access to information should be a key consideration in determining which party should bear the burdens of production and persuasion in a program carriage discrimination case after the complainant has established a *prima facie* case. The NPRM seeks comment regarding two possible frameworks for assigning these burdens: the "program access" framework, which shifts the burdens of production and persuasion to the defendant once a *prima facie* case has been established; and the "intentional discrimination" framework, which only shifts the burden of persuasion to the defendant if the complainant has established its *prima facie* case with direct evidence.[7] Under this framework, if the complainant relies on *circumstantial*

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4 NPRM at ¶¶ 19-24

5 *Id.* at ¶¶ 25-30.

6 *Id.* at ¶¶ 4-5, nn.9-12 (citing S . Rep No. 102-92 (1991) at 26-26; H.R. Rep. No. 102-628 (1992) at 41; 47 U.S.C. § 536(a)(3))

7 *Id.* at ¶ 80.

evidence, the burden of production (but not of persuasion) shifts to the defendant. The defendant then must produce evidence of legitimate and non-discriminatory reasons for its carriage decision, and the complainant must then prove that these reasons are "so implausible that they constitute pretexts for discrimination."

The FCC should adopt the program access framework, which properly shifts the burden of proof to the MVPD after the programmer has established a *prima facie* case of discrimination, regardless of whether that case was established with direct or circumstantial evidence. As the FCC recognizes, in many cases the only evidence of discrimination that is available to an independent programmer is circumstantial evidence.[8] In establishing a *prima facie* case, the programmer has already demonstrated that its claims have some merit and that enough evidence exists for the complaint to proceed.

The proposed "intentional discrimination" framework should be rejected because it further disadvantages independent programmers, who already bear the burden of establishing a *prima facie* case of discrimination while likely suffering serious informational disadvantages. The MVPD, and not the programmer, is the party likely to be in possession of crucial facts regarding the negotiations that led to the complaint. The Commission's proposed "intentional discrimination" framework in effect demands that the programmer prove its case twice; once when making a *prima facie* case, and then a second time over the high threshold of showing the MVPD's offered rationale to be a "pretext." Independent programmers should not be further burdened in attempting to enforce their rights because they lack access to information that they

[8] *Id.* at ¶ 13.

have no reasonable means of acquiring, and which often has been actively concealed. The MVPD, having the informational advantage, should also have the burden of disproving an established *prima facie* case.

III. The Commission Should Expedite Discovery Through Automatic Production

Discovery also plays a vital role in balancing the informational disparities between independent programmers and MVPDs, and HDNet urges the Commission to adopt expanded discovery procedures as discussed in the NPRM.[9] In particular, HDNet supports the Commission's proposal to require that certain types of documents be produced automatically upon a finding of a *prima facie* case of discrimination and a decision by the Media Bureau that it will rule on the merits after discovery.[10] Such a rule would be a time-saver for everyone involved because it would put all interested parties on notice, preventing delays due to the need to get consent from third parties prior to production. An automatic production rule would also avoid time-consuming disputes over relevancy. Parties can begin gathering these documents as soon as a complaint is filed, as well as inform individuals that are likely to be deposed of that possibility.

The FCC provides a list in the NPRM of documents that might be subject to an automatic discovery rule. HDNet believes the documents listed in the NPRM are especially important to the efficient and fair disposition of a carriage complaint and that the final rule should include all of these documents among those to be automatically produced. The parties would almost

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9 *Id.* at ¶¶ 41-47.

10 *Id.* at ¶ 44.

certainly request these categories of documents during discovery, and therefore their automatic exchange would expedite and simplify the process. To the list proposed by the FCC, however, HDNet would also suggest an addition. As noted above, MVPDs are not required to publicly reveal their ownership in, or contractual relationship with, a competing programmer. Therefore, among the documents that should be automatically produced, are those that relate to direct or indirect ownership interests and control, including past interests as well as present and future contingent interests (such as grants, warrants, or options to purchase) by the MVPD or its executives in other programmers producing competing programming, as well as documents that relate to any contractual relationships with such programmers. HDNet also supports expediting the discovery process by establishing a standard protective order to apply if the parties fail to agree upon a protective order prior to the proposed ten-day automatic production deadline. A swift and efficient resolution of a complaint benefits all parties, and a standard protective order would assist in moving the process along, either by providing a "stock" order, or by hastening negotiations to produce a customized order before the standard order is imposed.

IV. The Commission's Program Carriage Rules Must Prohibit All Forms of Retaliation

The possibility of retaliation for filing a legitimate carriage complaint has been one of the major impediments to independent programmers enforcing their rights under Section 616. A prohibition on retaliation is a crucial part of the Commission's implementation of Section 616; without assurance that they will be protected from retaliation, many programmers will continue to hesitate to bring complaints, even with the possibility of a temporary "standstill" while a complaint is pending. As the Commission observes, the standstill does not protect a

programmer's *other* content, nor does it protect a programmer after a complaint has been resolved.[11] Likewise, the standstill remedy cannot protect a programmer that has threatened to file a complaint but that has not done so, or protect a programmer that suffers retaliation because that programmer filed a complaint against *another* MVPD.

The Commission should adopt a rule prohibiting any MVPD from taking adverse carriage actions against a programmer because that programmer has taken advantage of the carriage complaint rules or raised the possibility of doing so. Such a rule is supported by the FCC's mandate, in Section 616, to prohibit "discrimination on the basis of affiliation or non-affiliation," as retaliation is nothing more than the act of discriminating because of affiliation with a programmer that has chosen to enforce its rights under the program carriage rules and/or who has mentioned discriminatory treatment based on affiliation for which the MVPD might possibly be held liable. The Commission has the power to "make such rules and regulations . . . as may be necessary with the execution of its functions,"[12] and such a rule is necessary to the creation of an effective program carriage regime. A remedy that programmers reasonably fear to avail themselves of is no remedy at all.

For the purposes of prohibiting retaliation, an "adverse carriage action" should be defined to include any impediment to fair competition by the programmer or any of its channels or content, including an MVPD switching a network to a less desirable channel position or tier, or refusing to renew an existing contract or only agreeing to do so on onerous terms.

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11 *Id.* at ¶¶ 64, 66

12 47 U.S.C. §154(i).

The Commission should consider it a *prima facie* case of retaliation (and thus of discrimination) if an "adverse carriage action" is taken against the programmer while a complaint is pending or after the programmer has expressed intent to file a complaint, but prior to the filing of a complaint. Likewise, an adverse carriage action (other than the action at issue in the initial or threatened program carriage complaint) should be considered a *prima facie* case of retaliation if it takes place within the later of three years after the complaint or threatened complaint has been resolved, or in connection with the first contract renewal after resolution.[13]

V. The Commission's Program Carriage Rules Should Prohibit All Forms of Discrimination on the Basis of Affiliation Which Otherwise Satisfy the Statute

The Commission already prohibits a vertically-integrated MVPD from discriminating in favor of programming in which it has an interest. The Commission now seeks comment on the scope of the discrimination provision, asking if it also should prohibit discrimination by a vertically-integrated MVPD based on a programmer's lack of affiliation with another vertically- integrated MVPD. [14] HDNet urges the FCC to not only adopt this rule, but to go

[13] Section 616 provides for the Commission to assess penalties for frivolous carriage complaints, and the same penalties could apply to claims of retaliation. However, in determining whether to impose such penalties, the Commission must give careful consideration and significant weight to the disparity of information between the parties; the test is not who prevails or even whether most reasonable independent programmers might allege retaliation under the known circumstances, but whether the complaint is devoid of logic and fact as to be "frivolous."

[14] NPRM at ¶ 72.

further and prohibit *all* discrimination that violates the statute based on *any* form of affiliation or non-affiliation. [15]

An MVPD that owns no programming interests can still discriminate in favor of a third party based on affiliation, whether another MVPD or a programmer. A pervasive form of discrimination in favor of a third party occurs when an MVPD discriminates in favor of channels that are bundled together by a powerful MVPD or programmer. In a very real sense, the MVPD may be "forced" to discriminate by that powerful content provider, which, on a wholesale basis may bundle carriage of its undesirable channels as a condition of acquiring a must-have or highly desirable channel from that content provider on reasonable terms. The decision to carry a channel principally because it is bundled together on a wholesale basis as an affiliate of other popular channels, perhaps with little audience interest compared to the competing independent network, is a form of discrimination based on affiliation that can and should be prohibited under statutory language of Section 616.

Wholesale bundling has been the subject of numerous comments in other proceedings (although it has not actually been addressed by the Commission),[16] but it should be addressed

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[15] For example, discrimination in favor of programming affiliated with a director or officer of the discriminating MVPD, although that programming is not affiliated with the MVPD proper, should be prohibited as discrimination based on affiliation under Section 616.

[16] For example, on January 3, 2008, the American Cable Association ("ACA") filed extensive comments in MB Docket No. 07-198, discussing the problems faced by small and medium sized cable companies because of ubiquitous wholesale tying and bundling arrangements. Other entities, including the Broadband Service Providers Association ("BSPA"), the National Telecommunications Cooperative Association, Consumers Union, Free Press, the Media Access Project, Public Knowledge, and various independent programmers, filed comments or *ex parte* communications supporting the ACA's position or stating similar positions against wholesale tying and bundling. *See e.g.*, the Notice of Ex Parte Presentation filed September 17, 2008 in MB Docket Nos. 07-42 and 07-198. The participants in the *ex parte* included the ACA, as well as Outdoor Channel, BSPA, Hiawatha Broadband, Parents Television Council, Western Telecommunications Alliance, OPASTCO, RCN, and HDNet.

here. One seeming example of such conduct recently surfaced when Multichannel News reported that Suddenlink Communications had informed its subscribers that Viacom had asked for a 20% increased payment for a package of channels that would include the movie service Epix.[17] According to Suddenlink, whether it could continue to carry all of Viacom's channels was at stake due to Suddenlink's resistance to the inclusion of Epix in the package (which included must-have programming, such as Nickelodeon, MTV, and Comedy Central).[18]

Limiting the prohibition on discrimination to discrimination in favor of vertically-integrated MVPDs ignores the realities of the modern market. Not only are MVPDs increasingly concentrated, but also independent programmers have waned, leaving most programming in the hands of a few large content providers. The FCC should recognize the incentive for MVPDs to favor not only their own content, but also the content of other major players, further reducing opportunities for independent programmers. HDNet has previously been told on more than one occasion that an MVPD has no room left for HDNet because the MVPD has been forced by big content providers to carry multiple affiliated channels that may be of less value in order to get must-have programming on reasonable terms. Therefore, any anti-discrimination rule should take this tendency into account and forbid discrimination based on the programmer's lack of affiliation with another entity and its programming, regardless of the

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[17] Mike Reynolds, Suddenlink Says 20% Price Hike, Epix At Center Of Viacom Renewal Negotiations, Multichannel News, December 29, 2010, http://www.multichannel.com/article/print/461586-Suddenlink_Says_20_Price_Hike_Epix_At_Center_Of_Viacom_Renewal_Negotiations.php.

[18] Suddenlink particularly objected to Viacom's insistence in charging a monthly subscriber fee for the channel for each of Suddenlink's customers, regardless of whether the customer chose to purchase the movie service, despite being informed by Suddenlink that its customers might not want the R-rated programming on Epix and had not requested the channel. *Id.*

MVPD's formal relationship with the entity enjoying the benefit of that discrimination. One valuable side effect of such a rule might be to spur MVPDs to resist such coercion, for their own benefit and that of their subscribers, and as well as for the benefit of truly independent programmers. The FCC should adopt a rule recognizing these realities and protecting diversity and fair competition, regardless of the formal structure and relationship of the companies involved.

VI. MVPDs Should Be Required to Negotiate in Good Faith

Bad faith negotiation is often just another form of discrimination based on affiliation, albeit one that is easily concealed and hard to prove. As the FCC wisely notes, an MVPD, rather than outright refusing carriage to an independent programmer, can get much the same result by "failing to respond to carriage requests in a timely manner, simply ignoring requests to negotiate for carriage, making knowingly inadequate counter offers, or failing to engage in renewal negotiations until just prior to the expiration of an existing agreement."[19]

HDNet does not agree with the FCC's suggestion that the good faith requirement be limited to vertically-integrated MVPDs and those that have similarly situated programming. As discussed above, discrimination based on affiliation takes many forms. Instead of negotiating carriage of a relatively population independent programmer on reasonable terms, an MVPD may favor less desirable channels offered by a major content provider in order to get that provider's essential programming on reasonable terms. In those circumstances, an MVPD might well

[19] NPRM at ¶ 68. *See also supra* note 4.

ignore or otherwise respond unreasonably to the request of an independent programmer for carriage rather than enter negotiations that it knows will not be successful and that may result in a carriage complaint. HDNet has on some occasions had substantial difficulty in meeting with programming executives (or even getting a response to requests for meetings), even involving entities with whom it has done or may still be doing some business. Failure to negotiate in good faith is another form of discrimination and should be treated as such by the Commission's final rules.

VII. The Commission Should Adopt Rules that Deter Discriminatory Conduct by MVPDs

The Commission proposes to adopt rules allowing for the award of damages for violations of the program carriage rules. HDNet supports this proposal, and moreover, supports the imposition of punitive damages in light of the differences in power and information between MVPDs and independent programmers. If an independent programmer suffers damages due to such causes as loss of advertising or loss of quality programming because of discrimination, it should be compensated for its loss. Although a standstill will significantly mitigate these damages (the programmer should still be compensated for losses that are incurred, due to uncertainty or otherwise), in the absence of a standstill, damages become vital to balance the scales between the programmer and the MVPD. In fact, wrongful discrimination can lead to the unraveling of other programming and carriage opportunities and be devastating to an independent programmer, whereas the MVPD might otherwise face only the risk of a fine and an

order to provide carriage. For this reason, the MVPD should be required to make the programmer whole for losses suffered due to discrimination.

Putative damages, when warranted, should also be available. The disparities in bargaining power and information between independent programmers and MVPDs mean that an MVPD may have an incentive to discriminate, gambling that the independent programmer will not or cannot enforce its rights. The programmer may conclude that even if the programmer does successfully bring a carriage complaint, the potential damages will not outweigh the benefits of discriminating in the first place, given the probability that its malfeasance will not be discovered. Therefore, punitive damages should be available in appropriate cases to provide a deterrent to discriminatory conduct by shifting this risk calculation. Further, the availability of punitive damages will encourage the settlement of disputes by exerting pressure on the MVPD to avoid the risk of a hearing. Punitive damages also are an appropriate remedy for retaliation.

The Commission should also take into account the calculation of risk by MVPDs and independent programmers and reject the idea of a "true-up" after a standstill. To a channel that incurs the cost of programming throughout the standstill period, as well as all of its other operating costs, the notion that it must pay revenue back if it does not prevail on its complaint would have a major chilling effect. Moreover, that obligation would be triggered at an already challenging moment when the programmer would have lost both subscriptions and associated revenue going forward. The standstill provision will typically come into play where a channel already had carriage, *i.e.*, an MVPD has previously determined that a channel was worthy of carriage and terms have previously been negotiated and agreed to by the parties. It is far less

hardship for the MVPD to be required to stick to the original terms of the bargain throughout the litigation of the dispute than for the programmer to forgo or relinquish revenues earned during that period if it does not prevail. A true-up effectively renders the standstill provision, and perhaps the entire complaint process, unavailable to independent programmers. The Commission already has rules that prohibit frivolous carriage complaints. A true-up provision, therefore, would primarily punish programmers who made a complaint in good faith, but lacked access to all of the facts involved in an MVPD's decision to refuse carriage. Because programmers often lack access to information in an MVPD's possession, a programmer seeking to make a complaint, and able to establish a *prima facie* case, would still hesitate to do so because of the risk that its complaint would be unsuccessful because it does not have access to the full story, and therefore might be subject to a potentially financially devastating true-up. Moreover, during the standstill, the MVPD continues to benefit from exhibiting the network that is the subject of the complaint and continues to receive the revenue attributable to such network from the MVPD's subscriber fees during such period, so any repayment required by a true-up would unjustly enrich such MVPD.

Therefore, the standstill requirement should be a true standstill and not require a "true-up" by the programmer if the complaint is ultimately resolved adversely to the programmer. The same terms that applied at the beginning of the standstill should continue to apply throughout the standstill, regardless of the final resolution.

Respectfully submitted,

/s/ David S. Turetsky

David S. Turetsky
J. Porter Wiseman
Dewey & LeBoeuf LLP
1101 New York Avenue NW, Suite 1100
Washington, DC 20005-4213
Counsel to HDNet, LLC